



Oifig an Choimisinéara um Fhaisnéis Comhshaoil
Office of the Commissioner for Environmental Information

Appeal to the Commissioner for Environmental Information
Case CEI/11/0007

European Communities (Access to Information on the Environment) (AIE) Regulations 2007 to 2011

Appellant: Mr. Pat Swords, [REDACTED]

Public Authority: Department of Environment, Community and Local Government (the Department)

Issue: Whether the Department was justified in charging a fee for the costs involved in searching for and retrieving the information requested

Summary of Commissioner's Decision: In accordance with Article 12(5) of the AIE Regulations, the Commissioner reviewed the decision of the Department and found that it was not justified in charging a fee for search and retrieval costs. She annulled the Department's decision accordingly.

Background

In a request dated 8 April 2011, the appellant sought access under the AIE Regulations to the following information:

1. All documentation relating to 'taking account of the public participation exercise' in relation to the waste policy and preparation of the Environment (Miscellaneous Provisions) Bill 2011 [excluding the submissions themselves].
2. All documentation related to procedures and norms for the preparation of public documentation as part of public participation exercises.
3. All documentation related to procedures and norms for 'taking account of the public participation'.

On 20 April 2011, the Department wrote to the appellant in reference to his AIE request for records "relating to public participation and the development of policy and legislation". The Department explained that the search and retrieval process was estimated to cost €146.65. The estimated cost was based on seven hours of staff time at an hourly fee of €20.95 in accordance with the fee schedule published on the Department's website. The Department requested the appellant to forward a deposit of 20%, i.e. €29.33, noting that the search and retrieval process would not commence until the deposit had been received. However, the appellant was invited to review or amend his request with a view to reducing the fee.

On 22 April 2011, the appellant applied for internal review of the decision to charge a fee for search and retrieval costs. He suggested that the environmental information he had requested was subject to the dissemination requirements of Article 7 of the AIE Directive, 2003/4/EC, upon which the AIE Regulations are based.

In an internal review decision dated 20 May 2011, the Department affirmed the original decision to request a deposit of 20% of the charge of €146.65 for the estimated cost of the search and retrieval work related to the appellant's request. The appellant made an appeal to my Office against the decision of the Department on 20 May 2011.

In a letter dated 25 January 2012, Ms. Anne Garland, Investigator, informed the Department of her preliminary view on the matter. Briefly stated, Ms. Garland considered that the Department is not entitled under the AIE Regulations and Directive 2003/4/EC to include in its charges the staff time spent in searching for and retrieving the information requested. In a reply dated 17 February 2012, the Department stated that it does not agree that its proposed fee is not in compliance with the requirements of the Regulations. Having had regard to the Department's submissions, as well as to the relevant section of the Guidance Notes published by the Department, I have decided to conclude this appeal by way of a formal, binding decision.

Scope of Review

The question before me is whether it is permissible under the AIE Regulations for a public authority such as the Department to charge a fee for the costs involved in searching for and retrieving the information requested.

Analysis and Findings

I previously considered the question of search and retrieval fees under the AIE regime in Case CEI/07/0006 - *Open Focus and Sligo County Council* (26 May 2008). I have reconsidered the question in the context in this case, but my conclusion remains by and large the same: it is neither permissible, nor is it reasonable having regard to the Directive, for a public authority to impose search and retrieval fees for the work involved in processing an AIE request. Such work is not part of the supply of information for which it is permissible to charge a fee; nor is charging for search and retrieval compatible with the prohibition on charges for the examination *in situ* of information requested. Allowing for such a charge would also run contrary to the purpose of the AIE Directive and the information or records management practices that are required of public authorities under the AIE regime. In other words, it would be inconsistent with the manner in which the AIE regime is meant to operate.

Relevant Provisions and Guidance Notes

Article 15 of the Regulations provides, in pertinent part:

"(1)(a) A public authority may charge a fee when it makes available environmental information in accordance with these Regulations (including when it makes such information available following an appeal to the Commissioner under article 12), provided that such fee shall be reasonable having regard to the Directive.
(b) Notwithstanding sub-article (a), a public authority shall not charge a fee for access to any public registers or lists of environmental information pursuant to Article 5(1)(d).
(c) Notwithstanding sub-article (a), a public authority shall not charge a fee for the examination *in situ* of information requested.
(d) Where an applicant examines information *in situ* and wishes to obtain copies of that information, a public authority may charge a fee, consistent with the list of fees specified under article 15(2), for the provision of such copies.
(2) Where a public authority charges a fee pursuant to sub-article (1), it shall make available to the public a list of fees charged, information on how they are calculated and the circumstances under which they may be waived."

Article 15 is intended to give effect to Article 5 of the AIE Directive, which states:

"I. Access to any public registers or lists established and maintained as mentioned in Article 3(5) and examination *in situ* of the information requested shall be free of charge.
2. Public authorities may make a charge for supplying

any environmental information but such charge shall not exceed a reasonable amount.

3. Where charges are made, public authorities shall publish and make available to applicants a schedule of such charges as well as information on the circumstances in which a charge may be levied or waived."

Recital (18) provides some guidance for determining what a "reasonable amount" may be: Apart from the commercial context, the rule is that "charges may not exceed the actual costs of producing the material in question". The Recital also specifies that "[i]nstances where advance payment will be required should be limited". The Guidance Notes published by the Department advise: "A 'reasonable' charge will vary depending on the volume of information to be released but could, for example, include the cost of staff or other costs connected with searching, retrieving, compiling or copying of the information."

Supplying Information v. Processing the Request

In my decision in CEI/07/0006, I referred to the judgment of the European Court of Justice in *Commission of the European Communities v. Federal Republic of Germany*, Case C-217/97 (9 Sept. 1999), which dealt with the provisions for charging under the previous AIE Directive, 90/313/EEC. In the context of this case, I note that the Court found that German legislation providing for a charge for "administrative acts" performed in the implementation of the German equivalent of the AIE Regulations was not, in principle, incompatible with Article 5 of Directive 90/313/EEC. However, the German Regulations included a detailed Tariff specifying the circumstances in which charges could be levied or reduced and it had also been established by the German courts that "any charge . . . for an administrative act must comply with the principle of proportionality and be appropriate having regard to the purpose of the service supplied".

Moreover, although the Court did not reject the German legislation on the basis of its provision for a charge for administrative acts, the Court observed later in its judgment, at paragraph 57, that Article 5 of Directive 90/313/EEC permitted "Member States to make a charge for 'supplying' information and not for the administrative tasks connected with a request for information". Thus, the Court drew a distinction between supplying information, on the one hand, and the acts involved in processing an information request on the other. It remains the case that the AIE Directive does not provide for the charging of fees for the processing of an AIE request. As I observed in CEI/07/0006:

"[I]n order for a decision maker within the Council to deal with the request for information and form a view as to whether it could be supplied under the Regulations, it would be necessary for the information at issue to be identified and retrieved. There is no provision in the Directive or in the Regulations for the charging of fees for the processing of a request for access to environmental information. Following the assessment of the information and, as in this case, a decision to release it, I consider that it is the next step - the supply of the information to the requester in copy for - that potentially attracts the charge."

It is also noteworthy that the Irish Regulations do not actually use the term "supplying information", but rather state that a public authority may charge a fee "when it makes available environmental information in accordance with the Regulations". Making information available, as commonly understood, means the actual provision of information, not the process of searching for and retrieving the information and determining what should or should not be released in response to the request.

On-sight Examination - Free of Charge

In addition, I note that in Case C-217/97 the Court stated: "In the absence of more details in the directive itself, what constitutes 'a reasonable cost' must be determined in the light of the purpose of the directive." The current Directive includes "more details" in that it now specifies that the examination *in situ* of the information requested shall be free of charge. As a result of the European Communities (Access to Information on the Environment) (Amendment) Regulations 2011 (S.I. No. 662 of 2011), this prohibition on charging for the on-sight examination of information requested has now been transposed into Irish law under Article 15(1)(c) of the AIE Regulations.

Arguably, the prohibition on charging under the Directive could be related to information requested from the public registers or lists established and maintained as mentioned in Article 3(5). However, even if the prohibition on charging were linked to public registers or lists, this itself could not reasonably be considered as having any limiting effect on the scope of the prohibition, because the Directive does not restrict the requirement to maintain public registers or lists to any particular types of environmental information. Moreover, allowing a charge for access to environmental information that is not included in the public registers or lists could act as a disincentive to full compliance with the requirement to maintain such registers or lists, which would undermine the purpose of the requirement in the first instance.

In any event, Article 15(1)(c) of the Regulations is not expressly linked in any manner to the public registers or lists of environmental information that a public authority is required to maintain and does not appear to be otherwise restricted in scope. If a public authority may not charge a fee for the on-sight examination of the information requested, then it would be inconsistent, and thus not reasonable, to allow search and retrieval costs to be included in the "supply" (or making available) of such information. As Áine Ryall observed in her article "Access to Environmental Information in Ireland: Implementation Challenges", *Journal of Environmental Law Advance Access*, 19 Jan. 2011: "The Commissioner's interpretation [in CEI/07/0006] is consistent with article 5(1) of Directive 2003/4/EC which provides that examination *in situ* of any environmental information requested must be free of charge. It follows logically from article 5(1) that public authorities are not entitled to levy a charge for the cost of identifying and retrieving information in response to a request." It also seems to me that allowing search and retrieval charges for "supplying" information, as opposed to the examination *in situ* of the information requested, would unduly penalise applicants who do not have the means to travel to the premises of the public authority concerned.

Purpose of Directive 2003/4/EC

I also do not see how charging for search and retrieval costs could be considered reasonable in light of the purpose of the current Directive and the obligations it imposes on public authorities. Directive 2003/4/EC replaced the previous A1E Directive for the purpose of

increasing and expanding public access to environmental information. The objectives of the current Directive are set out in Article 1 and include setting out "practical arrangements" for the exercise of the right of access and also ensuring that environmental information is "progressively made available and disseminated to the public in order to achieve the widest possible systemic availability". Accordingly, public authorities are obliged to maintain certain information or records management practices that are designed to facilitate access to environmental information. For instance, reference has already been made to the public registers or lists of environmental information that public authorities are required to maintain. Among other requirements, public authorities must also "make all reasonable efforts to maintain environmental information held by or for it in a manner that is readily reproducible and accessible by information technology or by other electronic means".

Thus, under the current AIE regime, the environmental information held by public authorities is meant to be systematically organised, catalogued, and at least ready for active dissemination to the public. In my view, charging for search and retrieval costs is not compatible with these intentions.

However, as I stated in CEI/07/0006, I have no difficulty with the advice that costs connected with compiling or copying of the information may be included in a charge made under Article 15(1)(a) of the Regulations. The acts of compiling and copying are consistent with "producing", the term used in Recital (18) of the Directive. Depending upon the circumstances of the case and the charging schedule published under Article 15(2) of the Regulations, a charge for compiling information may apply in situations where "new records" must effectively be produced due to the need for substantial redactions in order to protect third party interests, for instance.

Conclusion

In Case CEI/11/0001, *Mr. Gavin Sheridan and Central Bank of Ireland* (26 March 2012), I observed that, while the AIE regime imposes significant obligations on public authorities, there are also limits to the scope of the AIE regime. In order for information to qualify as "environmental information" for purposes of the AIE Regulations, it is necessary for the information to fall within one of the six categories set out in the definition in Article 3(1). I note that the Regulations also permit public authorities to refuse to make environmental information available where the request is manifestly unreasonable having regard to the volume or range of information sought or where it remains formulated in too general manner, taking into account the duty to assist the applicant under Article 7(8) (Articles 9(2)(a) and (b) refer).

In this case, it is not clear that any decision has been made to supply or make available any environmental information to the appellant in response to his request. The proposed charge of €146.65 relates solely to the search and retrieval process, which admittedly has not yet commenced. In any event, I consider that the proposal to charge for the staff costs involved in searching for and retrieving environment information in response to the appellant's request is not reasonable having regard to the Directive. I also do not accept that this is the type of situation in which a request for advance payment would be appropriate.

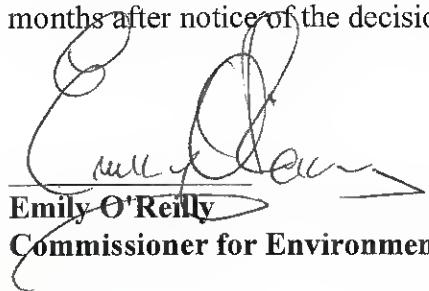
Decision

In accordance with Article 12(5) of the AIE Regulations, I have reviewed the decision of the

Department in this case. I find that the Department's decision to charge a fee for search and retrieval costs was not justified, nor was the decision to request a deposit. Accordingly, I annul the Department's decision regarding the charge and direct the Department to process the appellant's request in accordance with the Regulations.

Appeal to the High Court

A party to the appeal or any other person affected by this decision may appeal to the High Court on a point of law from the decision. Such an appeal must be initiated not later than two months after notice of the decision was given to the person bringing the appeal.

A handwritten signature in black ink, appearing to read "Emily O'Reilly".

Emily O'Reilly

Commissioner for Environmental Information

 **February 2013**